

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of Comcast Corp.)	MB Docket No. 14-57
and Time Warner Cable Inc.)	
)	
For Consent to Transfer Control of)	
Licenses and Authorizations)	

REPLY COMMENTS

Wade H. Hargrove
Mark J. Prak
Julia C. Ambrose

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wells Fargo Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

September 24, 2014

Table of Contents

I.	Preliminary Statement	1
II.	The Proposed Condition	2
III.	Standard of Review	5
IV.	The Public Interest Will Be Served By The Condition	7
A.	The TW Transaction Will Give Comcast Additional Leverage In Highly-Concentrated Local MVPD Markets.....	7
B.	The Proposed Modest Joint Negotiation Condition Is Essential To Maintaining A Fair, Efficient Retransmission Consent Marketplace	11
C.	Absent A Prohibition On Joint Negotiations, Comcast’s Agreement To Limit Its Market Share Would Be Meaningless	15
	Conclusion.....	17

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of Comcast Corp.)	MB Docket No. 14-57
and Time Warner Cable Inc.)	
)	
For Consent to Transfer Control of)	
Licenses and Authorizations)	

REPLY COMMENTS

**I.
Preliminary Statement**

The ABC Television Affiliates Association, CBS Television Network Affiliates Association, and the FBC Television Affiliates Association (collectively, the “Affiliate Associations”),¹ by their attorneys, hereby reply to comments filed in connection with the above-captioned proceeding and transaction (“TW Transaction”).²

In 2010, the non-NBCU Stations reached a voluntary agreement with Comcast Corporation (“Comcast”), to ensure that Comcast and its cable television systems (“Comcast

¹ The ABC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the ABC Television Network. The CBS Television Network Affiliates Association is a nonprofit trade association representing television stations affiliated with the CBS Television Network. The FBC Television Affiliates Association is a nonprofit trade association representing television stations affiliated with the Fox Television Network. Collectively, the Affiliate Associations represent more than 500 television stations affiliated with the three principal commercial television networks that are not related to parties to the TW Transaction.

² *Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and SpinCo to Assign and Transfer Control of FCC Licenses and Other Authorizations*, Public Notice, DA 14-986, MB Docket No. 14-57 (rel. July 10, 2014) (“Notice”).

Cable Systems”), through its acquisition of NBCUniversal (“NBCU”), would not unfairly discriminate against or competitively disadvantage local broadcast stations not owned by or affiliated with the NBC or Telemundo Television Networks (“non-NBCU Stations”³). That agreement was incorporated by mutual consent into the Commission’s 2011 Order approving Comcast’s acquisition of NBCU.⁴

As a result of the rapid change in the video distribution marketplace, the Affiliate Associations have additional concerns arising out of the TW Transaction.⁵ The Affiliate Associations and Comcast have been engaged in constructive discussions for several weeks continuing to late in the day on September 23, and have resolved most of these concerns with the exception of the extent to which Comcast may engage in certain joint retransmission consent negotiations with other MVPDs in the same market.

II. The Proposed Condition

On information and belief, Comcast currently engages in joint retransmission consent

³ As used herein, the term “NBCU Stations” means television broadcast stations owned by, controlled by, or under common control with Comcast or affiliated with the NBC Television Network, the Telemundo Network, or any other television broadcast network owned by, controlled by, or under common control with Comcast.

⁴ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) (“*Comcast/NBCU Order*”), at ¶ 168 & Appendix F. In fact, one of the conditions mutually agreed to was extended by order of the Commission.

⁵ The Applications and Public Interest Statement of Comcast Corp. and Time Warner Cable Inc., MB Docket No. 14-57 (April 8, 2014) (“*Applications*”), seek approval of a TW Transaction in which (1) Comcast would acquire certain cable systems from TWC, (2) Comcast would sell certain cable systems to, and acquire other cable systems from, Charter Communications, and (3) Comcast would divest itself of certain cable systems to SpinCo, as detailed in applications filed in MB Docket No. 14-57. *See Applications* at 7; *Notice* at 1-2. According to Comcast, the TW Transaction will leave the combined company with less than 30 percent of all *managed* residential MVPD customers nationwide. *See Applications* at 6-7, 143.

negotiations with, provides assistance to, or conducts retransmission consent negotiations with or for various cable television systems in which Comcast does not own a controlling interest and which are located in the same market as a Comcast cable system. The Affiliate Associations do not object for purposes of this proceeding to grandfathering those existing agreements or to new joint retransmission consent negotiations with certain in-market companies to whom Comcast may spin off one or more systems. Under the TW Transaction, it appears that Comcast, however, would acquire the right to negotiate retransmission consent for Bright House Networks systems that are located in the same market as a Comcast system. To the same extent policymakers have addressed the potential anticompetitive implications of allowing local television stations to engage in joint retransmission consent negotiations,⁶ the Affiliate Associations respectfully request the Commission to impose the following condition (“the Condition”) upon any approval of the TW Transaction:

“Neither Comcast nor any Comcast cable system shall participate or engage in retransmission consent negotiations for any MVPD in which Comcast does not have, directly or indirectly, more than a fifty percent (50%) ownership interest for retransmission of a Non-NBCU Station, except as follows:

- (1) Any cable system owned by a company with whom Comcast had joint negotiation agreements in existence as of January 1, 2014; and
- (2) Any Comcast cable system which Comcast may in the future sell, transfer, or divest all or any portions of, but in which Comcast, directly or indirectly, maintains some ownership or programming management (but for clarity, not including cable systems that are commonly owned with such former Comcast cable systems but which Comcast did not previously own and control).

⁶ The Commission has enacted measures, and the U.S. House of Representatives has approved legislation (H.R. 4572), the relevant section of which is expected to soon be approved by the U.S. Senate, to prohibit joint retransmission negotiations by independently owned and controlled television stations in the same market.

Nothing herein shall be construed to prevent the licensing or sharing by Comcast or a Comcast cable system of any technology (e.g., the X1 operating system) with any company or cable system.”

The proposed Condition would grandfather Comcast’s existing joint retransmission consent arrangements with other cable companies with whom it currently has such arrangements and also allow it to jointly negotiate for additional companies to whom Comcast may spin off existing systems if it previously owned and controlled those companies.

The requested Condition is a modest proposal to ensure that Comcast will not be able to use its increased size and expanded local presence to discriminate against and competitively disadvantage local television broadcasters that are not owned by NBCU or affiliated with the NBC Network in retransmission consent negotiations with other in-market MVPDs.

Moreover, as the *Applications* emphasize, the TW Transaction would provide Comcast with just under 30 percent of all MVPD subscribers nationwide. That limitation would be illusory—indeed, self-contradictory—if the Commission does not prohibit Comcast from engaging in retransmission consent negotiations jointly with, or on behalf of, other MVPDs not formerly owned and controlled by Comcast and reaping the financial benefits of its increased negotiating leverage.

For these reasons, the Affiliate Associations respectfully urge the Commission to adopt the proposed Condition.

III. Standard of Review

“[B]efore the Commission can approve the transfer of control of authorizations and licenses in connection with a proposed merger, [it] must find that the proposed transfers serve the public interest, convenience, and necessity.”⁷ The public interest standard “is a flexible one that encompasses the ‘broad aims of the Communications Act,’”⁸ including its “deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, [and] ensuring a diversity of information sources and services to the public.”⁹ Although the public interest standard is concerned with more than competitive issues, it does “include[] an evaluation of the effect of the proposed transaction on competition . . . and in the case of [MVPD] services, a consideration of the impact on program

⁷ *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160 (1999) (“*Tele-Communications Transfer Order*”), at ¶ 13 (footnote omitted). See 47 U.S.C. § 310(d) (“No construction permit or station license . . . shall be transferred, assigned, or disposed of in any manner . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”).

⁸ *In re Applications of Teleport Commc’ns Group Inc., Transferor, and AT&T Corp., Transferee*, Memorandum Opinion and Order, 13 FCC Rcd 15236 (1998), at ¶ 11 (footnote omitted); see also *Tele-Communications Transfer Order* at ¶ 13 (“To make th[e] public interest finding, [the Commission] must weigh the potential public interest harms and benefits. At a minimum, this requires that the merger does not interfere with the objectives of the Communications Act.”) (footnote omitted).

⁹ *Comcast/NBCU Order* at ¶ 23; see also *Tele-Communications Transfer Order* at ¶ 14 (Commission’s public interest “analysis must include, among other things, consideration of the possible competitive effects of the transfer” but is not “limited by traditional antitrust principles”; it “also encompasses the broad aims of the Communications Act” and considers whether the transfer will “frustrate [the] implementation or enforcement of the Communications Act and federal communications policy,” including its “deeply rooted . . . preference for competitive processes and outcomes.”).

and viewpoint diversity.”¹⁰ In fact, as the Commission stated earlier this year, “conduct that violates our national policies favoring competition is ‘not within the competitive marketplace considerations standard’ set forth in Section 325(b)(3)(C) of the [Communications] Act.”¹¹

The governing standard, then, requires the Commission to consider whether the TW Transaction will enhance competition in furtherance of the public interest. The TW Transaction will give the combined company, with its increased size and market presence, unfair negotiating leverage vis-à-vis local non-NBCU Stations in retransmission consent negotiations. Allowing the combined company to persuade or compel unaffiliated MVPDs to negotiate retransmission consent jointly with Comcast (or to authorize Comcast to negotiate on their behalf) would magnify the disparity in bargaining power still further. Absent a prohibition on joint retrans negotiations, the TW Transaction would inflict serious competitive harm on non-NBCU stations who rely significantly on retransmission consent fees to produce essential local programming at the heart of the Commission’s longstanding commitment to broadcast localism.¹² In order to maintain a fully competitive retransmission consent marketplace, the joint negotiation condition proposed by the Affiliate Associations is essential.

¹⁰ See Joint Petition to Deny of Consumers Union and Common Cause (“Consumers Union/Common Cause Petition”) at 7 (quoting *In re FCC Declines to Approve Echostar-DIRECTV Merger*, News Release, 2000 WL 31268861 (FCC Oct. 10, 2002)).

¹¹ *In re Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (Mar. 31, 2014) (“*Joint Negotiation Order*”), at ¶ 23 (footnote omitted).

¹² *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report, 2005 FCC LEXIS 4976 (Sept. 8, 2005), at ¶ 50 n.172 (noting that the retransmission consent regime plays an important part in “promot[ing] the continued availability of the over-the-air television system, a substantial government interest in Congress’ view”) (citation omitted).

**IV.
The Public Interest Will Be Served By The Condition**

A. The TW Transaction Will Give Comcast An Unfair Retrans Negotiating Advantage In Highly-Concentrated Local MVPD Markets

Comcast, the nation's largest multichannel video programming distributor ("MVPD"),¹³ owns and operates cable systems that serve 22.6 million subscribers.¹⁴ TWC is the fourth-largest MVPD in the nation, with approximately 11.4 million subscribers.¹⁵ Post-TW Transaction, and following divestiture of roughly 4 million subscribers, Comcast would add roughly 7 million more cable subscribers to its already significant market share, leaving the combined company with just under 30 million subscribers nationwide—roughly 30 percent of the total MVPD market.¹⁶ That count does not include the 2.1 million cable television subscribers of Bright House Networks, LLC, which is owned by Time Warner Entertainment-Advance/Newhouse Partnership ("TWE-A/N"), an entity in which TWC holds a 66.67 percent interest.¹⁷ Upon

¹³ As a result of its 2011 merger with NBCUniversal, Comcast also owns and controls the NBC and Telemundo broadcast television networks, multiple broadcast stations, several cable networks, and various online content assets. In addition, through NBC network affiliation agreements, Comcast has the ability to control certain aspects of the relationship between the NBC Television Network and its more than 200 local television station affiliates.

¹⁴ *Notice* at 3 n.12; *see also Applications* at 8.

¹⁵ *Applications* at 14; *see also Notice* at 3 n.12.

¹⁶ *See Notice* at 2 & n.6, 3; *see also* Letter to Marlene H. Dortch Secretary, Federal Communications Commission, from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, and Steven Teplitz, Senior Vice President, Government Relations, Time Warner Cable Inc., M.B. Docket No. 14-57 (June 5, 2014) at 3 ("*Divestiture Transactions Letter*") (noting that the TW Transaction will include certain divestiture transactions that will leave Comcast serving approximately 29 percent of MVPD subscribers nationwide).

¹⁷ Advance/Newhouse Partnership ("A/N") holds the remaining 33.3 percent of BHN. Because A/N exercises "exclusive day-to-day management responsibility for and *de facto* control over" BHN, Comcast insists that although the TW Transaction "will technically effect a transfer of TWC's indirect legal interest in [BNH] to Comcast, the transaction will not result in any

(Continued . . .)

consummation of the TW Transaction, Comcast will, in the absence of the proposed Condition, acquire the ability to negotiate retransmission consent with local television stations for the Bright House Networks—including several Bright House Network systems located in the same market in which Comcast cable systems are located.

Importantly, the TW Transaction will provide Comcast a major presence in several major television markets in which it currently has a limited presence or none at all, including New York City, Los Angeles, and Dallas-Fort Worth¹⁸ (again, not including those markets in which BHN has a dominant presence—namely, Tampa-St. Petersburg). The Affiliate Associations have been advised that Comcast presently has approximately 3% of the cable subscriber market in Tampa, while BHN has approximately 69%; that Comcast has approximately 63% of the cable subscriber market in Indianapolis, while BHN has approximately 13.5%. Post-TW Transaction, Comcast, through its relationship with BHN, would control 72% of the cable market in Tampa and 76.5% of the market in Indianapolis. The relationship between TWC and Bright House

(. . . continued)

actual change of control over the [BHN] licenses and authorizations, because [A/N] (not TWC) currently has and will post-transaction retain all day-to-day managerial control over, and all economic interest in, all of the licenses and authorizations held by” BHN. *Applications* at 173 n. 468. *See also* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, Catherine Bohigian, Executive Vice President, Government Affairs, Charter Communications, Inc., and Steven Teplitz, Senior Vice President, Government Relations, Time Warner Cable Inc., M.B. Docket No. 14-57 (June 24, 2014) (“*Comcast Supplemental Letter*”) at 9-13 (declaring that TWC does not, and Comcast will not, “manage [BHN] or control any aspect of its day-to-day operations,” so that its customers should not be counted among Comcast’s post-Transaction subscribers) (footnote omitted). The *Applications* admit, however, that TWC currently provides certain services to BHN and that “Comcast and BHN have yet to determine the parameters of their relationship post-transaction.” *Comcast Supplemental Letter* at 11; *see also Applications* at 173 n.468.

¹⁸ *Applications* at 25-26; *see also Notice* at 5.

Networks, in which TWC has an ownership interest and for which it handles programming negotiations, technology deals, and engineering services, has raised particular concern among various commenters. See, e.g., Sinclair Petition at 17 (noting that “Comcast has not indicated an intent to terminate [TWC’s] relationship with Bright House,” pursuant to which “TWC routinely negotiates on behalf of” BHN for the acquisition of programming content); Shalini Ramachandran, TWC Deal Puts Wrinkle in Comcast Merger Plan, *The Wall Street Journal* (Aug. 17, 2014) available at <<http://online.wsj.com/articles/twc-arrangement-adds-wrinkle-to-comcast-deal-1408316427>> (last viewed Sept. 23, 2014) (noting that “[i]f Comcast continues handling Bright House’s programming negotiations, Comcast would be buying programming for 32 million customers, or nearly 32% of the pay TV market”; the relationship between TWC and Bright House also “would extend Comcast’s influence in broadband to the 1.9 million Internet customers served by Bright House”).

As noted earlier, local MVPD television markets are already highly concentrated. As other commenters have reported, Comcast’s shares of MVPD subscribers in major local markets were already significant even before the TW Transaction. As of January 2011, for example, Comcast had “market shares of 64 percent in Philadelphia, 62 percent in Chicago, 60 percent in Miami, and 58 percent in San Francisco (based on MVPD subscribers).”¹⁹ In 2013, the U.S. Court of Appeals for the Second Circuit observed that

[w]hile the entry of DBS providers, telephone companies, and OVDs into the MVPD market has significantly increased competition, . . . cable operators

¹⁹ Consumers Union/Common Cause Petition at 11 n.23 (quoting *United States v. Comcast Corp.* Civ. Action No. 1:11-cv-00106 (D.D.C.), Competitive Impact Statement, Sec. II.C (Jan. 18, 2011), available at <<http://www.justice.gov/atr/cases/f266100/266158.htm>> (last viewed Sept. 18, 2014)).

continue to maintain significant MVPD market shares in many localities. For example, as of mid-2010, Comcast maintained at least a 40% share in 13 of the 20 largest MVPD markets in the United States, ranging from as low as 43% in Houston to as high as 62% in Chicago and 67% in Philadelphia.²⁰

The Second Circuit cited to the Commission's own observations, in its order approving the Comcast/NBCU merger, that

based on second quarter 2010 data, of the top 10 DMAs in the United States, Comcast has at least 42 percent of total MVPD subscribers in seven. Comcast has over 60 percent of MVPD subscribers in the third (Chicago, 62 percent) and fourth (Philadelphia, 67 percent) largest MVPD markets. Of the 20 largest DMAs, Comcast holds more than 40 percent of the market in 13 of them. In those 13 markets, Comcast's market share ranges from a low of 43 percent in Houston, Texas to a high of 67 percent in Philadelphia, Pennsylvania.²¹

The proposed Condition is essential if Comcast is to be precluded from increasing its leverage in retransmission negotiations still further by negotiating jointly with (or on behalf of) not only Bright House, but with other MVPDs not previously owned and controlled by Comcast in the already highly concentrated local markets where Comcast will have a significant market presence post-TW Transaction. Absent such a prohibition, Comcast would have the ability to coordinate retrans negotiations with other cable operators such as Cox Cable, Mediacom, Spin Co, Charter, AT&T, Verizon, DISH and DIRECTV—indeed with *every other MVPD in every local television market in which Comcast operates*. Without the proposed Condition, local, non-NBCU Stations face the prospect of a *single* MVPD representative—Comcast—negotiating retransmission consent on behalf of *every* MVPD in every Comcast market, leaving local broadcasters at the mercy of a single provider virtually nationwide to negotiate for

²⁰ *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 153 (2d Cir. 2013) (citations omitted).

²¹ *Comcast/NBCU Order* at ¶ 116 n.275 (citing *U.S. Multichannel Operator Comparison by Market*, 2010 Q2 (SNL Kagan/ MediaBiz 2010)).

retransmission consent. The public interest and the Commission's and Congress's longstanding policy favoring competition in retransmission consent negotiations compel the Condition to prohibit such an unfair and anticompetitive result.²²

B. The Proposed Modest Joint Negotiation Condition Is Essential To Maintaining A Fair, Efficient Retransmission Consent Marketplace

The TW Transaction would position Comcast to disadvantage non-NBCU Stations in negotiating the terms and conditions of carriage not only by Comcast's various video delivery systems but with other MVPDs in the same market if Comcast remains free to negotiate retransmission consent jointly with other large MVPDs in the same market while local broadcasters are prohibited from engaging in precisely the same negotiations jointly with other stations in the same market. The Commission recently amended its retransmission consent rules to ban joint retransmission consent negotiations by non-commonly-owned, "top four" rated television stations in the same market.²³ According to the Commission's amended rules, "joint negotiation by stations that are ranked among the top four stations in a market as measured by

²² See, e.g., Consumers Union/Common Cause Petition at 11-13, 17 & n.23 (observing that, "[i]n many local geographic markets for broadband and cable services, Comcast and TWC already have significant market power" and citing data establishing Comcast's significant market shares in Philadelphia, Chicago, Miami, and San Francisco); *id.* at 30 (noting that "Comcast would control almost every key metropolitan market"; because "video programmers would need distribution carriage through Comcast," the combined company "could dictate what programs get carried or not—not only in its markets but across America"); Sinclair Petition at 3 (observing that "[t]he horizontal combination would result in a dramatic increase in the merged entity's bargaining power and control over the video programming industry" and that "[t]he combined company would have the ability to leverage its dominance in the MVPD market, in order to reduce competition and increase market share in the video programming industry"); *id.* at 9 ("Comcast would have the ability to discriminate given its unprecedented MVPD scale."); Consumer Federation Petition at 15 ("Comcast is the nation's largest buyer of professional video content.").

²³ *Joint Negotiation Order* at ¶¶ 1, 6, 9-10.

audience share (‘Top Four’ stations) and are not commonly owned [now] constitutes a violation of the statutory duty to negotiate retransmission consent in good faith.”²⁴ The U.S. House of Representatives has enacted H.R. 4572 to extend the prohibition to all—not just “top four”—stations in the same market, and it appears the U.S. Senate is poised to do the same. As the Commission reasoned earlier this year, joint negotiation in these circumstances “eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues” and “gives such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations are conducted negotiations for carriage of their signals independently.”²⁵

The very same concerns for skewing the retransmission consent marketplace and harming competition warrant the imposition of the proposed joint-negotiation Condition on the TW Transaction: Allowing Comcast, which already enjoys negotiation leverage in some of the country’s largest television markets,²⁶ to increase its negotiating leverage by negotiating retransmission consent jointly with (non-commonly-owned or –controlled²⁷) MVPDs in the same

²⁴ *Joint Negotiation Order* at ¶ 1 (footnote omitted).

²⁵ *Joint Negotiation Order* at ¶ 13 (footnotes omitted); *see also id.* ¶ 14 (observing that “collaboration by competing broadcast stations could harm competition by increasing the potential for firms to coordinate over price or other strategic dimensions, and/or by reducing incentives of firms to compete with one another”) (internal quotation marks and citation omitted).

²⁶ As NAB observed in the joint negotiation proceeding, MVPDs already enjoy significant leverage in negotiations because they are “highly clustered and consolidated.” Comments of the National Association of Broadcasters, *In re Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71 (May 27, 2011), at 32.

²⁷ The Affiliate Associations agree that the prohibition on joint negotiation should *exclude* those MVPDs under “common *de jure*” ownership or control with Comcast. *See* (Continued . . .)

market, to share pricing information, or to coordinate carriage terms and conditions would obviously raise the problems of unfair competition and the skewing of competitive marketplace forces that prompted the Commission’s prohibition against the joint retransmission consent negotiation by local broadcast stations in the same market.²⁸ Absent the proposed prohibition on joint retrans negotiations, the TW Transaction would place the same—indeed, greater—unfair and anticompetitive advantages in the hands of Comcast and skew the outcome of retransmission consent negotiations in local Comcast Cable System markets.

The authorities the Commission cited in the *Joint Negotiation Order* indicate that collaboration among distributors threatens the same anticompetitive effects that motivated the joint negotiation rule:

Competitor collaborations may involve agreements jointly to sell, distribute, or promote goods or services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or *on the use of competitively significant assets, such as an extensive distribution network*, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making;

(. . . continued)

STELA Reauthorization Act of 2014, H.R. 4572, Sec. 102 (amending 47 U.S.C. § 325(b)(3)(C) to add language prohibiting “a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent . . . to a multichannel video programming distributor, unless such stations are directly or indirectly *under common de jure control* permitted under the regulations of the Commission”) (emphasis added). Of note, the bill prohibits joint retransmission consent negotiations even more broadly than does the Commission’s rule: It prohibits joint or coordinated negotiations between *any* two stations in a local market that are not under common control and is not limited to “top four” stations.

²⁸ In support of the joint negotiation rule, the Commission observed generally that “agreements not to compete or to fix prices are inconsistent with competitive marketplace considerations and the good faith negotiation requirement.” *Joint Negotiation Order* at ¶ 11 (citation and internal quotation marks omitted).

by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. . . .²⁹

A reciprocal prohibition on joint negotiations by Comcast and other (non-commonly-owned or – controlled) MVPDs in the same market, then, would be “harmonious with antitrust law”³⁰ and would further the same public interests that prompted the Commission’s *Joint Negotiation Order*.

As the *Joint Negotiation Order* notes, “[t]he statutory duty to negotiate retransmission consent in good faith applies to both broadcasters and MVPDs.”³¹ And although the Commission declined to impose a blanket joint negotiation prohibition on MVPDs in that proceeding, it did note that “MVPDs are obligated by the statute to negotiate retransmission consent in good faith” and that “[w]here MVPDs that serve the same geographic market jointly negotiate for the right to retransmit broadcast signals, they may be subject to a complaint under the totality of circumstances test for a violation of that reciprocal duty and [the Commission]

²⁹ *Joint Negotiation Order* at ¶ 14 n.59 (quoting Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000) at 14, available at <http://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf>(last viewed Sept. 23, 2014) (emphasis added).

³⁰ *Joint Negotiation Order* at ¶ 22. As the *Joint Negotiation Order* indicates, although the Commission’s consideration of the TW Transaction is not limited to evaluation of potential anticompetitive effects under the Sherman Act, “[t]he Commission on multiple occasions has drawn on antitrust principles in exercising its responsibility under the [Communications] Act to regulate broadcasting in the public interest.” *Id.* ¶ 23 (footnote omitted).

³¹ *Joint Negotiation Order* at ¶ 1 n. 2 (citing 47 U.S.C. § 325(b)(3)(C)).

may give close scrutiny to such joint negotiation.”³² In light of the increased size, market power, and negotiating leverage Comcast will obtain if the TW Transaction is approved, the Commission’s pro-competitive rationale warrants every effort to place the parties on equal footing in retransmission consent negotiations—including a reciprocal prohibition, as proposed herein, on joint retrans negotiations.

It is the Commission’s expressed goal to “prohibit arrangements among competitors that eliminate competition among them and thereby generate supra-competitive retransmission consent fees, because any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement imposed by Congress.”³³ That purpose can be served only by imposing the proposed joint retransmission consent negotiation prohibition on Comcast as a condition of the TW Transaction.

C. Absent A Prohibition On Joint Negotiations, Comcast’s Agreement To Limit Its Market Share Would Be Meaningless

To its credit, Comcast recognizes the potential for anticompetitive concern and has agreed, accordingly, to limit the size of its share of the national MVPD market. That undertaking would be meaningless, however, if Comcast remains free to use its significant market share in local markets to encourage or compel other MVPDs in the same markets to

³² *Joint Negotiation Order* at ¶ 33. Although the Commission “decline[d] to address at th[at] time whether joint negotiation by same market MVPDs should be considered a violation of the duty to negotiate retransmission consent in good faith,” it reserved the right to consider the issue “in the future as it protects and promotes competition.” *Id.*

³³ *Joint Negotiation Order* at ¶ 20 (internal quotation marks and citation omitted).

negotiate jointly for retransmission consent with local broadcast stations.³⁴ Absent an appropriate prohibition on joint retransmission consent negotiations, Comcast’s agreement to limit its national “market share” will provide no effective constraint on the combined company’s ability to exert anticompetitive negotiating leverage against local, non-NBCU Stations in retransmission consent negotiations in local markets—and to extract supracompetitive terms from local broadcasters.

To summarize, as the proposed Condition indicates, the Affiliate Associations accept, for purposes of this specific proceeding, grandfathering of the joint retransmission consent negotiating arrangements Comcast currently has with certain other cable companies in Comcast markets and with certain other newly created arrangements in limited circumstances where Comcast diverts or spins off certain cable systems it previously owned and controlled. But it is the creation of new joint retransmission consent negotiating arrangements to which the Affiliate Associations object.

The proposed Condition is a modest measure to ensure that Comcast cannot aggrandize its already-significant retransmission consent negotiation leverage by combining with other MVPDs (or negotiating on their behalf)—to the detriment of competition in the retransmission consent marketplace, and ultimately to the detriment of viewers.

³⁴ See Sinclair Petition at 2 (“On information and belief, [TWC] also negotiates content acquisition on behalf of [BHN], further extending the buying power of the combined company.”).

Conclusion

For the foregoing reasons, the Affiliate Associations respectfully request that the Commission impose the proposed Condition set forth herein to prohibit Comcast from jointly negotiating retransmission consent with independently owned MVPDs in key local television markets and thereby promote and preserve an open, competitive, local retransmission consent marketplace.

Respectfully submitted,

**ABC TELEVISION AFFILIATES
ASSOCIATION**

**CBS TELEVISION NETWORK AFFILIATES
ASSOCIATION**

**FBC TELEVISION AFFILIATES
ASSOCIATION**

/s/
Wade H. Hargrove

/s/
Mark J. Prak

/s/
Julia C. Ambrose

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wells Fargo Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Their Attorneys

September 24, 2014